

1 Robert Bonsignore
2 Bonsignore Trial Lawyers, PLLC
3 3771 Meadowcrest Drive
4 Las Vegas, NV 89121
5 Office Phone: (781) 350-0000
6 Cell Phone: (781) 856-7650
7 Facsimile: (702) 852-5726
8 Email: rbonsignore@classactions.us

Francis O. Scarpulla (41059)
Patrick B. Clayton (240191)
Law Offices of Francis O. Scarpulla
456 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 788-7210
Facsimile: (415) 788-0706
Email: fos@scarpullalaw.com
pbc@scarpullalaw.com

6 Theresa D. Moore (99978)
7 Law Offices of Theresa D. Moore
8 One Sansome Street, 35th Floor
9 San Francisco, CA 94104
10 Telephone: (415) 613-1414
11 tmoore@aliotolaw.com

12 *Interim Co-Lead Counsel for Omitted
13 Repeater State Indirect-Purchaser Plaintiffs*

14 [ADDITIONAL COUNSEL LISTED ON
15 SIGNATURE PAGE]

16 **UNITED STATES DISTRICT COURT**
17
NORTHERN DISTRICT OF CALIFORNIA
18
SAN FRANCISCO DIVISION

19
IN RE: CATHODE RAY TUBE (CRT)
20 **ANTITRUST LITIGATION**

21 Master File No. 3:07-cv-5944-JST

22 MDL No. 1917

23
NOTICE OF MOTION, MOTION AND
MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO VACATE ORDERS AND
JUDGMENT CERTIFYING SETTLEMENT
CLASS, APPROVING SETTLEMENT AND
AWARDING ATTORNEYS' FEES (DKT.
4712, 4717, 4740)

24
This Document Relates to:
All Indirect-Purchaser Actions

25
Hearing Date: August 22, 2019
26 Time: 2:00 p.m.
27 Courtroom: 9, 19th Floor
Judge: Hon. Jon S. Tigar

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on August 22, 2019, at 2:00 p.m., before the Honorable Judge Jon S. Tigar, United States District Court for the Northern District of California, 450 Golden Gate Ave., Courtroom 9, 19th Floor, San Francisco, California, Interim Co-Lead Counsel for Omitted Repealer State Indirect-Purchaser Plaintiffs, by and through undersigned counsel), will and hereby do move, pursuant to Federal Rule of Civil Procedure 60(b) and this Court's inherent authority, for an order vacating the Order and the Judgment Granting Final Approval of Indirect Purchaser Settlements (Dkt. 4712, 4717) and the Order on Attorneys' Fees, Expenses, and Incentive Awards Re: Indirect Purchaser Plaintiff Settlements (Dkt. 4740).

The motion is based on this notice, the accompanying memorandum of points and authorities in support of the motion, all other pleadings and papers filed in this action, and such additional evidence or argument that may be presented at the hearing.

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I. INTRODUCTION

At the June 6, 2019 hearing, this Court made it clear that it was inclined to vacate the settlements at issue in this case in accordance with the Ninth Circuit’s February 12, 2019 remand order (the “Remand Order”), but felt constrained to do so at that time because: “... the question of whether to vacate the prior settlement isn’t presently before me. It’s not before me today.” Reporter’s Transcript of Proceedings on June 6, 2019, 55:3-5 (“R. Tr. [page(s)]:[line(s)]”). Therefore, in accordance with the Ninth Circuit’s Remand Order, Interim Co-Lead Counsel for the Omitted Repealer States (“ORS”) move this Court to vacate the Order and the Judgment Granting Final Approval of Indirect Purchaser Settlements (Dkt. 4712, 4717) as well as the Order on Attorneys’ Fees, Expenses, and Incentive Awards Re: Indirect Purchaser Plaintiff Settlements (Dkt. 4740) (collectively, the “Orders”).¹

Prior to the issuance of the Ninth Circuit’s Remand Order, this Court – asserting the benefit of hindsight gained during the appellate proceedings – concluded that it had erred in entering the Orders. Dkt. 5362 (“Indicative Ruling Order”). In its Indicative Ruling Order, the Court cited to IPP counsels’ defense (at the appellate oral argument) of its release of the ORS class members’ claims for nothing as a necessary trade-off to obtain compensation for the other 22 repealer state class members, including the District of Columbia (the “Included Repeater States”). That paradigmatic example of a conflict of interest during the negotiation process required the appointment of separate counsel for the ORS. The Court indicated that such facts also suggested an adjustment to the fees awarded to Lead IPP Counsel (defined below) might be appropriate. In light of this Court’s statements, the Ninth Circuit elected to remand the case to

¹ Indirect-Purchaser Plaintiffs' Class Counsel recently filed a request for a trial date, underscoring the need to vacate the Orders. *See* Dkt. 5519. While the ORS class members look forward to participating in the alternative dispute resolution ordered by this Court with an eye toward a resolution of this action, they respectfully suggest that no complete settlement can be achieved unless the prior Orders are vacated.

1 allow the Court “to reconsider its order on class certification and settlement approval,” while
2 retaining responsibility for future appeals. 9th Cir. Case 16-16373 (“App. Dkt.”), Dkt. 252 at 12.

3 This Court recently undertook a further exploration of the previously approved
4 settlements and concluded that appointment of separate counsel to represent the ORS class
5 members and the non-repealer state class members was necessary. Further, the Court vacated a
6 stipulation entered into by Lead IPP Counsel in 2010 during his representation of the ORS class
7 members—a stipulation that Defendants, and even Lead IPP Counsel himself, had argued on
8 appeal may limit the ability to include the ORS’ damages claims in this case. As a result of these
9 findings, the ORS class members respectfully suggest that the Orders cannot stand and should be
10 vacated.

11 This Motion is necessary to comply with the Ninth Circuit’s direction that the Orders on
12 settlement class certification and approval of those settlements be reconsidered by this Court. At
13 oral argument, the Ninth Circuit expressed its serious concerns regarding the representation of
14 the ORS class members’ interests in the litigation and negotiations that led to the settlements
15 releasing their repealer state economic damages claims for nothing, while securing \$577 million
16 for other subclasses of repealer state class members. Those concerns were well-founded, as
17 reflected in this Court’s subsequent actions.

18 The settlements at issue presents a textbook example of the deleterious effects of the
19 absence of the due-process safeguards that Federal Rule of Civil Procedure 23(a)(4) mandates
20 for certification of a settlement class. Those due process failings in this case were twofold:
21 (1) unaligned named representatives and (2) conflicted lead class counsel. Lead IPP Counsel and
22 the named plaintiffs were charged with zealously representing the ORS class members in the
23 litigation and negotiation process, but such failings rendered their representation inadequate.
24 The inclusion of the ORS class members in the certified nationwide settlement class and release
25 – while omitting them from the state-law economic-damage subclasses receiving payment –
26 violated Rule 23(a)(4). The settlements themselves, which provided for a recovery to only a

1 subset of repealer state class members, also violated the requirement that a settlement be fair,
2 reasonable and adequate. Therefore, the unequal treatment of the ORS claims cannot properly
3 stand.

4 Vacation of the Orders should be granted to allow for the resolution of this case –
5 whether through pragmatic negotiation of completely new settlements or trial – in a manner that
6 does not work an injustice to any subgroup of class members or disregard the rights of certain
7 members solely to benefit others. Due process requires no less.

8 II. FACTUAL BACKGROUND

9 This multidistrict litigation (the “MDL”) arises from an alleged international conspiracy
10 to fix the price of cathode ray tubes (“CRTs”) worldwide from March 1, 1995 through November
11 25, 2007. Various actions filed in federal courts throughout the country were consolidated in this
12 Court as an MDL in February 2008, and Mario Alioto was appointed as Interim Lead Counsel
13 (“Lead IPP Counsel”) to represent all indirect-purchaser plaintiffs (“IPPs”) of CRT-containing
14 products in the United States. In the course of that representation, Lead IPP Counsel negotiated
15 eight settlement agreements releasing the claims of every IPP nationwide, including the nine
16 ORS, in exchange for a settlement fund of approximately \$577 million to be shared by a
17 subgroup of those releasing consumers.

18 The claims released by the settlements fell into two broad categories: repealer states,
19 whose state laws allow for the recovery of monetary damages for antitrust violations (“Repealer
20 States”), and non-repealer states (“Non-Repealer States”), whose state laws do not permit
21 antitrust damages actions. The settlements at issue deemed 21 states and the District of
22 Columbia to be Repealer States and 29 states to be Non-Repealer States.

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1 On July 7 and July 14, 2016, respectively, this Court entered a final order and a judgment
 2 certifying the nationwide settlement class requested by Lead IPP Counsel, granting final
 3 approval to settlements against six sets of Defendants (the “Settlements”) and approving the
 4 allocation of an aggregate \$577 million fund from the eight total settlements.² Dkt. 4712
 5 (Order), 4717 (Judgment) (collectively, the “Certification Order” or the “Final Approval Order”).
 6 Thereafter, on August 3, 2016, the Court issued its attorneys’ fee order, awarding approximately
 7 \$159 million in class counsel attorneys’ fees. Dkt. 4740 (the “Attorneys’ Fee Order”). Thus,
 8 class members in nine states that allow for the recovery of economic damages for indirect-
 9 purchaser, end-user/consumer damages were represented by IPP Class Counsel, yet had their
 10 rights released in exchange for nothing.

11 In August 2016, various groups of objectors, including consumers from the ORS who
 12 whose rights were to be waived without compensation (the “ORS Objectors/Appellants”),
 13 appealed the Orders. That appeal was fully briefed and argued before the Ninth Circuit on April
 14 10, 2018.³ In support of their appeal, the ORS Objectors/Appellants presented the following
 15 facts:

- 16 1. the ORS consumers held state law damage claims similar to the class members in
 17 the 22 other Included Repealer States (including the District of Columbia), which
 18 entitled them to an economic recovery;
- 19 2. the named representatives for the certified nationwide settlement class were all
 20 consumers from Included Repealer States (the “Named Representatives”);
- 21 3. the Named Representatives for the nationwide settlement class secured an
 22 economic recovery for the release of their claims in the Settlements;

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 25 ² Two settlement agreements with other Defendants whose funds were included in the allocation
 26 plan had previously received final approval from this Court on March 22, 2102 and April 18,
 27 2014. Dkt. 1105, 2542.

³ Argument access at
https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013465.

- 1 4. Lead IPP Counsel assigned zero value to the ORS consumers' state law damages
- 2 claims in the litigation proceedings and the negotiation of the settlements;
- 3 5. the ORS consumers did not receive representation of their state law damages
- 4 claims in the negotiation of the settlement fund; and
- 5 6. the ORS consumers ultimately were forced to release their claims for nothing,
- 6 along with class members in the Non-Repeater States.

7 In addition to failing to pursue the ORS consumers' claims in the district court litigation
 8 and negotiation process, Lead IPP Counsel and the other IPP Class Counsel aggressively
 9 attacked the claims held by the ORS class members, all of whom they represented as part of the
 10 certified nationwide settlement class, during the course of the appeal proceedings. *See* 9th Cir.
 11 Case No. 16-16368, Dkt. 93 (Answering Brief ("AB")) at 48 ("none of the absent class members
 12 in those three states had viable damages claims"); AB74 ("Massachusetts, Missouri and New
 13 Hampshire Claims Are Valueless") (emphasis in original); AB44 (they are "meritless"). Lead
 14 IPP Counsel has even taken the *Defendants'* position over that of his ORS, asserting that
 15 amendment to include them would be "highly prejudicial to [the Defendants]." *See* AB80.

16 At oral argument, the Ninth Circuit explicitly stated its concern over the lack of
 17 representation given to the ORS consumers.

18 JUDGE CLIFTON: My problem now is that we've got a
 19 settlement tied up that purports to release – that does release
 20 claims on behalf of people from those states ... without appearing
 21 to have any return to them and without appearing to have anybody
 22 at the table speaking for them.
 23 Audio: 33:56–34:15 (Tr. 27:23-25; 28:1-11).

24 On October 1, 2018, after court-ordered alternative-dispute-resolution efforts failed, the
 25 IPP/Appellees filed a Motion for an Indicative Ruling with this Court, seeking an endorsement of
 26 a proposed adjustment to the allocation plan that would include the ORS class members but
 27 would treat them differently. On November 8, 2018, the Court rejected that motion. Dkt. 5362.
 In that Indicative Ruling Order, the Court stated that, with the benefit of hindsight, it had erred in

1 approving the Settlements and cited issues relating to both the fairness of the Settlements and the
 2 adequacy of counsel in the process leading up to Lead IPP Counsel's agreement to them. The
 3 Court focused upon the Settlements' release of the ORS consumers' repealer-state damages
 4 claims for nothing and Lead IPP Counsel's concession at the Ninth Circuit oral argument that the
 5 release of those claims was a necessary component of obtaining compensation for the Included
 6 Repeater State class members. The Court stated that "whether the issue is framed as one of
 7 conflict of interest or adequacy of counsel, it requires further exploration and potentially the
 8 appointment of separate counsel" as well as a possible "adjustment to the fees awarded to Lead
 9 Counsel." *Id.* at 2.

10 On February 13, 2019, the Ninth Circuit issued an order remanding the case to this Court
 11 "to reconsider its order on class certification and settlement approval." App. Dkt. 252 at 12. In
 12 doing so, the Court of Appeals cited specifically to the Indicative Ruling Order and this Court's
 13 statement that it had erred in approving the Settlements. *Id.* at 10. The Ninth Circuit further
 14 stated that the Court's finding that the Settlements should have provided a recovery to the ORS
 15 class members "necessarily affects ... the adequacy of representation under Federal Rules of
 16 Civil Procedure 23(a)(4)" and "the attorneys' fees awarded to Lead Counsel." *Id.* at 10-11.

17 Subsequent to remand, in response to a motion by counsel for the ORS plaintiffs, on July
 18 3, 2019, the Court appointed the undersigned as Interim Co-Lead ORS Counsel to represent a
 19 subclass comprised of the omitted repealer state class members.⁴ Dkt. 5518. The Court also
 20 appointed counsel to represent a subclass of IPPs with claims in Non-Repeater States. In
 21 addition, the Court vacated the 2010 stipulation entered into by Lead IPP Counsel, except to the
 22 extent that it permitted inclusion of named plaintiffs from Maine in the Third Consolidated
 23 Amended Complaint.

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 26 ⁴ The ORS subclass includes the states of Arkansas, Massachusetts, Missouri, Montana, New
 27 Hampshire, Oregon, Rhode Island, South Carolina, and Utah (the "ORS Subclass").

1 At a hearing on June 6, 2019, the Court on four occasions indicated that it intended to
 2 vacate the prior settlements, but that the issue was not before the Court at the time. R. Tr. 10:16-
 3 11:4; 11:17-24; 14:17-21; 55:3-6.

4 The present motion seeks to put that issue squarely before this Court – *i.e.*, the
 5 reconsideration ordered by the Ninth Circuit and the vacation of the Orders based upon the
 6 proceedings subsequent to their issuance in this Court, as well as for each of the reasons
 7 presented to the Ninth Circuit on appeal relating to class certification, final approval and
 8 attorneys' fees.

9 III. ARGUMENT

10 Pursuant to Federal Rule of Civil Procedure 60(b)(6), a district court may reconsider and
 11 vacate a judgment “whenever such action is appropriate to accomplish justice.” *Liljeberg v.*
 12 *Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988); *see also Mitchell v. City of*
 13 *Pittsburg*, No. C 09-00794 SI, 2011 WL 3877081, at *3 (N.D. Cal. Sept. 2, 2011). There have
 14 been multiple rulings in this case subsequent to this Court’s Orders that impact the certification
 15 of a settlement class and approval of the original settlements as fair, reasonable and adequate.
 16 Under Rule 60, the Court should reconsider and vacate the Orders.

17 A. **This Court’s Finding that Approval of the Settlement Was in Error 18 Mandates Vacation.**

19 Under Federal Rule of Civil Procedure 23(e), any settlement of a class action lawsuit
 20 must be fair, reasonable and adequate. Fed. R. Civ. P. 23(e). For absent class members to be
 21 validly bound, a court must find that each of those prerequisites is met. *Id.*

22 In its Indicative Ruling Order, the Court recognized that it had erred in approving the
 23 settlement here. Specifically, the Court found that the settlement agreed to by Lead IPP Counsel
 24 and Defendants should have provided for a monetary recovery to the ORS class members for the
 25 release of their claims. Dkt. 5362 at 1. That finding was in line with dispositive law.

1 A settlement that releases the claims of class members without consideration or for lack
 2 of value exchanged is unreasonable, unfair and inadequate. *See Reynolds v. Beneficial Nat'l.
 3 Bank*, 288 F.3d 277, 282-284 (7th Cir. 2002); *Yoshioka v. Charles Swab Corp.*, No. 11-1625-
 4 EMC, 2011 WL 6748984, at *12 (N.D. Cal. Dec. 22, 2011) (“uncertain value of the settlement
 5 ma[de] the release given in exchange therefore problematic” and final settlement approval
 6 denied); *Daniels v. Aeropostale West Inc.*, No. 12-05755-WHA, 2014 WL 2215708, at *3 (N.D.
 7 Cal. May 29, 2014) (“[n]o one should have to give a release and covenant not to sue in exchange
 8 for [nothing]”).

9 Because this Court has found that the standards under Rule 23(e) for approval of a
 10 settlement are not present here, the Orders should be reconsidered and vacated.

11 **B. Reconsideration and Vacature of Settlement Class Certification Is Similarly
 12 Required.**

13 The certification of the nationwide settlement class in the Final Approval Order cannot be
 14 validly maintained, so the settlement agreements are incapable of final approval. *See Molski v.
 15 Gleich*, 318 F.3d 937, 956 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart
 16 Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *In re Payment Card Interchange Fee & Merch. Disc.
 17 Antitrust Litig.*, 827 F.3d 223, 231 (2d Cir. 2016), *cert. denied sub nom. Photos Etc. Corp. v.
 18 Home Depot U.S.A., Inc.*, 137 S. Ct. 1374 (2017) (“Class actions and settlements that do not
 19 comply with Rule 23(a)(4) and the Due Process Clause cannot be sustained.”). Substantive
 20 settlement fairness under Fed. R. Civ. P. 23(e) is not a substitute for the adequacy of
 21 representation during the litigation and negotiation process that is a prerequisite to certification
 22 under Fed. R. Civ. P. 23(a)(4). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621-22 (1997).

23 As the Ninth Circuit observed in its Remand Order, this Court’s recognition that the
 24 negotiation of a settlement that failed to provide for any recovery to the ORS plaintiffs
 25 “necessarily affects” the adequacy of representation under Federal Rule of Civil Procedure
 26 23(a)(4). As a prerequisite to certification, Rule 23(a)(4) requires a proposed class to be
 27 adequately represented by both a named plaintiff who possesses aligned interests and incentives

1 and unconflicted class counsel who vigorously pursued the interests of the class members he or
 2 she represents. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999) (the fact that the
 3 settlement may have overall benefits for all class members is not the “focus” in “the
 4 determination whether proposed classes are sufficiently cohesive to warrant adjudication”)
 5 (citation omitted); *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1168 (9th Cir.
 6 2013); *see also General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161 (1982) (“rigorous
 7 analysis” by district court required before certifying proposed settlement class); *Amchem*, 521
 8 U.S. at 622.

9 With respect to named plaintiffs, the lynchpin of adequacy is “the alignment of interests
 10 and incentives between the representative plaintiffs and the rest of the class.” *Dewey v.*
 11 *Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012); *see Radcliffe*, 715 F.3d at
 12 1165. Here, none of the Named Representatives in the settlement class held the state-law
 13 damages claims possessed by the ORS consumers. Similarly, no class representatives included
 14 in the settlement class shared common interests with the class members from the ORS, and none
 15 protected their state law claims. *See, e.g., Lightbourne v. Printroom Inc.*, 307 F.R.D. 593, 604
 16 (C.D. Cal. 2015), *appeal dismissed*, No. 15-56392 (9th Cir. Feb. 10, 2016). Thus, the unaligned
 17 and conflicted named representatives of the nationwide settlement class who agreed to release
 18 the claims of the ORS class members included in that nationwide class for nothing were
 19 inadequate.

20 In the absence of an adequate named representative, denial of certification of a settlement
 21 class that included the ORS consumers was mandated – regardless of the proffered (and now
 22 debunked) defense by Lead IPP Counsel that no claims existed. *See Molski*, 318 F.3d at 956; *In*
 23 *re Joint Eastern & Southern District Asbestos Litig.*, 982 F.2d 721, 743 (2d Cir. 1992) (“the
 24 adversity among subgroups requires that the members of each subgroup cannot be bound to a
 25 settlement except by consents given by those who understand that their role is to represent solely
 26 the members of their respective subgroups”), *opinion modified on other grounds on reh’g*, 993

1 F.2d 7 (2d Cir. 1993); *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263, 283,
 2 296 (D. Kan. 2010).

3 In addition, counsel in a nationwide class action has a fiduciary duty to represent the
 4 interests of all class members, including the unnamed plaintiffs in each state, whom counsel has
 5 undertaken to represent. *See Radcliffe*, 715 F.3d at 1167 (citation omitted). Yet Lead IPP
 6 Counsel, along with the other Class Counsel, have continually argued against the interests of the
 7 ORS consumers, including in the appellate proceedings preceding the Remand Order.⁵

8 Adequate legal representation for class members requires their counsel not to take actions
 9 that would prejudice their rights. *See Her v. Regions Fin. Corp.*, No. 2:07-CV-2017-RTD, 2007
 10 WL 2806558, at *2 (W.D. Ark. Sept. 25, 2007) (prior to class certification, lead counsel has duty
 11 to protect substantive legal rights of putative class members from prejudice). The statements
 12 Lead IPP Counsel made on appeal foreclose the possibility that he satisfied those standards in
 13 representing the nationwide settlement class certified in the Certification Order. Heightened
 14 scrutiny of a lawyer's representation of a proposed settlement class is necessary partly because
 15 the lawyer stands to gain fees only through the successful resolution of a case – especially when
 16 class action fees are as significant as they are here and the motivation to secure a settlement may
 17 be fueled by that self-interest. *See Ortiz*, 527 U.S. at 852.

18 **C. Vacation of the Attorneys' Fee Order Is Required.**

19 Because certification of the settlement class and final approval of the settlement should
 20 be reconsidered and vacated, so should the order awarding fees and costs. *See, e.g., Radcliffe v.*
 21 *Experian Info. Sols. Inc.*, 715 F.3d 1157, 1167–68 (9th Cir. 2013) (“Because we reverse the
 22 settlement, we must also reverse the awards of attorneys' fees and costs.”); *In re Gen. Motors*

23
 24 ⁵ IPP counsel's recent request for a trial date was filed without their providing advance notice of
 25 the request and without their making even an attempt to meet and confer. That request did not
 26 take into account the needs of the ORS consumers to review the evidence and prepare for trial.
 27 IPP Class Counsel refuses to provide counsel for the ORS any of the evidence it gathered during
 discovery. Even now, Lead IPP Counsel continues to act against the interests of the ORS.

1 *Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir.), cert. denied, 516
2 U.S. 824 (1995).

3 **IV. CONCLUSION**

4 The ORS Plaintiffs respectfully ask the Court to vacate the orders and judgment
5 certifying a nationwide settlement class, approving the settlements, and awarding attorneys' fees
6 and for such other and further relief as this Court deems just.

7 Dated: July 19, 2019

Respectfully submitted,

8 /s/ Robert J. Bonsignore
9 Robert J. Bonsignore

10 Robert J. Bonsignore, *admitted pro hac vice*
Bonsignore Trial Lawyers, PLLC
11 3771 Meadowcrest Drive
Las Vegas, NV 89121
12 Telephone: (781) 856-7650
Facsimile: (702) 852-5726
13 rbonsignore@classactions.us

14 *Interim Co-Lead Counsel for Omitted
Repeater State Indirect-Purchaser Plaintiffs*

15 Michael Noonan, *pending pro hac vice*
William Shaheen, *pending pro hac vice*
Christine Craig, *pending pro hac vice*
Lucy Karl, *appearing pro hac vice*
Shaheen and Gordon
16 353 Central Avenue
P.O. Box 977
17 Dover, NH 03821
Telephone: (603) 871-4144
Email: mnoonan@shaheengordon.com
wshaheen@shaheengordon.com
ccraig@shaheengordon.com
lkarl@shaheengordon.com

18 Joseph Alioto (42680)
19 Alioto Law Firm
One Sansome St., 35 Floor
20 San Francisco, CA 94104
Telephone: (415) 434-8900
Email: jmalio@aliotolaw.com

21 *Co-Counsel to Robert J. Bonsignore, Esq.*

/s/ Francis. O. Scarpulla
Francis O. Scarpulla

Francis O. Scarpulla (41059)
Patrick B. Clayton (240191)
Law Offices of Francis O. Scarpulla
456 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: 415-788-7210
Facsimile: 415-788-0706
fos@scarpullalaw.com
pbc@scarpullalaw.com

22 *Interim Co-Lead Counsel for Omitted
Repeater State Indirect-Purchaser Plaintiffs*

23 John G. Crabtree, *appearing pro hac vice*
Brian Tackenberg, *appearing pro hac vice*
Crabtree & Auslander
24 240 Crandon Boulevard, Suite 101
Key Biscayne, FL 33149
Telephone: (305) 361-3770
Facsimile: (305) 437-8188
jcrabtree@crabtreelaw.com
btackenberg@crabtreelaw.com

25 Brian M. Torres, *appearing pro hac vice*
Brian M. Torres, P.A.
One S.E. Third Avenue, Suite 3000
Miami, FL 33131
Telephone: (305) 901-5858
Facsimile: (303) 901-5874
Email: btorres@briantorres.legal

26 *Co-Counsel to Francis O. Scarpulla, Esq.*

1 /s/ Theresa D. Moore

2 Theresa D. Moore

3 Theresa D. Moore (99978)

4 Law Offices Of Theresa D. Moore

5 One Sansome Street, 35th Floor

6 San Francisco, CA 94104

7 Telephone: (415) 613-1414

8 tmoore@aliotolaw.com

9 *Interim Co-Lead Counsel for Omitted*

10 *Repealer State Indirect-Purchaser Plaintiffs*

11 Christopher A. Nedeau

12 The Nedeau Law Firm

13 154 Baker Street

14 San Francisco, CA 94117-2111

15 Telephone: (415) 516-4010

16 Email: cnedeau@nedeaulaw.com

17 *Co-Counsel to Theresa D. Moore, Esq.*

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20

21

22

23

24

25

26

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed *via* CM/ECF on July 19, 2019 and as a result has been served on all counsel of record *via* transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Robert J. Bonsignore
Robert J. Bonsignore